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16 August 2016

GSA, FAS, Southwest Supply and Acquisition Center 7QSBAAB
819 Taylor Street (13A33)
Ft. Worth, TX 76102-6114

Attn: Donald Spears
Contract Specialist

Subject: FOIA Disclosure Objection of all Polaris' unit pricing information related to its
LTATV BPA Contract GS-07F-AA516 / QSDLAB-S9-13-2340-LATV

Ref: Freedom of Information Act Request

Dear Mr. Spears:

This objection is in response to your 16 August 2016 email regarding a FOIA request for release of Polaris Defense, hereinafter "POLARIS", unit pricing and/or information that would allow the requestor to back into POLARIS' unit pricing relating to its subject LTATV BPA Contract. First, POLARIS does object, in the strongest possible terms, to any release, whatsoever, of its trade secrets and commercial or financial information provided the Government related to its LTATV BPA Contract with the GSA.

Following is a detailed and specific response clarifying how POLARIS would suffer substantial competitive harm from the release of its itemized and extended pricing data contained in its proposal and subsequent contract award.

POLARIS' itemized and extended pricing data, as discussed herein, are exempt from the disclosure requirements of FOIA and therefore should not be provided to the requester for the reasons set forth below.

I. General Position

POLARIS' itemized and extended pricing data related to its proposal and any subsequent award that a requester would seek is protected from disclosure within the scope of the fourth exemption to the FOIA, 5 U.S.C. § 552(b)(4). That exemption encompasses two separate categories of information -- "trade secrets" and "commercial or financial information obtained from a person and privileged or confidential." What POLARIS seeks to prevent from being disclosed relates to its commercial or financial information and qualifies as privileged and confidential commercial data.

POLARIS seeks to protect its privileged and confidential commercial data. The accepted test for such information has been articulated by the United States Court of Appeals for the District of Columbia in the case of National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Commercial information is confidential if disclosure of it is likely to have either of the following effects:

- (1) to impair the Government's ability to obtain necessary information in the future; or
- (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

National Parks, supra, at 770.

The U.S. District Court for the District of Columbia has "consistently held that the term 'commercial' should be given its ordinary meaning." Klayman & Gurley v. U.S. Department of Commerce, C.A. No. 88-0783, 1990 U.S. Dist. LEXIS 4329, 6; see also Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983). "Thus, information is commercial if it relates to commerce, . . . or it has been compiled in pursuit of profit." Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 644 F. Supp. 344, 346 (D.D.C. 1986)¹ (citing American Airlines, Inc. v. National Mediation Bd., 558 F.2d 863, 870 (2d Cir. 1978) and Public Citizen, 704 F.2d at 1290). See also McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1285 (9th Cir. 1987) ("Information is commercial if it relates to commerce, trade, or profit.")

To demonstrate the "likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. Actual competition and the likelihood of substantial competitive injury is all that need be shown." Gulf & Western Indus., Inc. v. United States, 615 F.2d at 527, 530 (D.C. Cir. 1979).

To the extent that a document or information falls within the scope of exemption 4, a Federal agency has little or no discretion in determining whether or not to release it. Release outside the Government of "information [which] concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any . . . corporation . . ." is prohibited by the Trade Secrets Act, 18 U.S.C. § 1905.

For disclosure purposes, FOIA and the Trade Secrets Act are treated as coextensive. Chrysler Corp. v. Brown, 441 U.S. 281, 319, n. 49 (1979); Bartholdi Cable Co., Inc. v. FCC, 14 F.3d 274 (D.C. Cir. 1997); CNA Financial Corp. v. Donovan, 830 F.2d 1132,

¹ In Critical Mass, the Court established that information provided on a "voluntary" basis to the Government is "confidential" if "it is of a kind that customarily would not be released to the public by the person from whom it was obtained." Critical Mass, *supra*, at 879.

1151 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988); General Motors Corp. v. Marshall, 654 F.2d 294, 296-97 (4th Cir. 1981). If an agency record contains information that must be protected under the Trade Secrets Act, it would be an abuse of discretion for the agency to release it. See Chrysler Corp. v. Brown, supra.

What follows is an analysis and further discussion of the aforementioned tests with request to the documentation at issue.

II. Itemized and Extended Pricing Data As Confidential Business Information

If a requester seeks release/disclosure of POLARIS' confidential itemized and extended pricing data that utilized POLARIS' trade secrets. Obviously, since POLARIS' does not publish or otherwise make publically available its itemized and extended pricing data, a requester is seeking to obtain inappropriate and illegal "back door" access to POLARIS' proprietary trade secrets.

POLARIS' itemized and extended pricing data contains information that concerns how POLARIS prices its products to customers. POLARIS developed this information at great expense over many years. Disclosure of this information will allow POLARIS' competitors to improve their competitive position at POLARIS' expense. Such disclosure would help POLARIS' "competitors to underbid it" in current and future domestic and international competitions and permit its "customers to bargain down ('ratchet down') its prices more effectively" McDonnell Douglass Corp. v. NASA, 981 F. Suppp. 12, 16 (D.D.C. 1997). Any competitor with knowledge of POLARIS' itemized and extended pricing data would be in a position to compete more effectively on current and future domestic and international requirements.

As examples, in addition to subject LTATV contract, POLARIS is presently competing for other U.S. Govt. contracts and expects to compete on additional solicitations within the near future.

Competition is fierce among companies in the Government LTATV market. Moreover, the competition extends to the international governmental markets. For purposes of disclosure, "competition may include competition in the future and in other enterprises." Raytheon Company v. Department of the Navy, C.A. No. 89-2481, U.S. Dist. LEXIS 18281; See also National Parks & Conservation, 489 F.2d at 770-71 ("It might be shown . . . that disclosure of information about concession activities will injure the concessionaire's competitive position in a non-concession enterprise. In that case, disclosure would be improper.")

Several courts have determined that information such as that which POLARIS seeks to protect should not be disclosed under FOIA. For example, it has been held "that line item pricing was confidential information and not disclosable." MCI Worldcom, Inc. v. USAF, 163 F. Supp. 2d 28 (D.D.C. 2001). Similarly, the court in McDonnell Douglas Corp. v. NASA, 981 F. Supp. 12, 16 (D.D.C. 1997), agreed that release of unit pricing "would permit its commercial customers to bargain down ('ratchet down') its prices more effectively" and "would help its domestic and international competitors to underbid it" and hence prohibited such disclosure. Further, the D.C. Circuit Court opinion states that "[o]ther than in a monopoly situation[,] anything that undermines a supplier's relationship with its customers must necessarily aid its competitors."

III. Conclusion

The GSA would be abusing its discretion if it were to release any of POLARIS'

itemized and extended pricing data, or other information that would allow a competitor, or potential competitor, to discern the requested information. Such itemized and extended pricing information requested under FOIA would fall under a FOIA exception as discussed above.

In making its determination to prevent or allow disclosure of information, the GSA must weigh the interests of the entity making the FOIA request (requester) and the general public against the interest of the entity (POLARIS') whose information is the subject matter of the request. While the requester does not have to justify its reasons for the information request, in assessing potential competitive harm, it is proper for the GSA to consider whether a release in this matter will result in POLARIS suffering "precisely the injuries that let [the D.C.] Circuit to declare that line item pricing was confidential information and not disclosable." MCI Worldcom, Inc. v. USAF , 163 F. Supp. 2d 28 (D.D.C. 2001). Clearly, in light of present competition to supply LTATV products, if the GSA disclosed POLARIS' information – itemized and extended pricing information that POLARIS has always kept confidential -- such an act would certainly result in competitive harm to POLARIS and provide a competitive advantage to its competitors.

We request that your office specifically advise us, in writing, of your final decision in this matter. If you determine that any of the information at issue, for whatever reason and on whatever basis, should be released, we request that we receive written notification at least two weeks before actual release. This will permit POLARIS to take whatever action necessary to protect its interests.

Please contact the undersigned at (b) (6) with any questions or need for additional information.

Sincerely yours,

(b) (6)

Randall W. Sweeney
Director, Government Contracting
Polaris Defense